FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-5471

THOMAS W. WHALEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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In this reply brief, the petitioner will first address the respondent's contentions with respect to the constitutionality of the consecutive sentence imposed here. Then, he will consider the respondent's contention that Congress intended to permit consecutive sentences for felony murder and the underlying felony, and address the respondent's suggestion that this Court should altogether ignore this question of legislative intent.

I. THE CONSTITUTIONAL ISSUE

Petitioner argued in his brief that he could not, consistent with the Constitution, be sentenced consecutively upon his convictions for first degree felony murder (rape) and the underlying rape which was charged and proved as the predicate for that felony murder. This is because the rape was a lesser included offense of the felony murder. (Petitioner's Brief, at 13-22). As the Court of Appeals said, the rape is an element of the felony murder (rape). Thus it is the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (Petitioner's Brief at 8-13, 22-26). In its response, the government argues, first, that the felony on which a felony murder charge is premised is not, in fact, a lesser included offense of the felony murder, (Respondent's Brief, at 18-30), and second, that even if it is, the Double Jeopardy Clause permits multiple punishment for offenses standing in this relationship. (Respondent's Brief at 30-53). Since petitioner anticipated and met these very arguments in his intitial brief, lengthy response is unnecessary. There are, however, several points that need to be made.

To begin with, it is well to recognize that a good deal of the diffficulty in the government's argument is due to the fact that it fails to appreciate the actual and conceptual relationship between felony murder and the underlying felony. Only because of this failure can the government lay any claim to the support of common sense for its position.[1]

[1] On page 50 of its brief, respondent suggests that this Court reject petitioner's argument as "contrary to common sense". One may ask how helpful common sense actually is in this area of Double Jeopardy law. The man on the street would doubtless have more than a little trouble trying to wend his way through, say, *Iannelli v. United States*, 402 U.S. 770 (1975), or *Jeffers v. United*

[footnote continued]

Under the District of Columbia felony murder statute, as under most other such statutes, evidence of intent to commit an underlying felony, such as rape or robbery, does not, as the government would have it, merely "serve as evidence of intent to commit the murder as well" (Respondent's Brief at 12). The felony murder statute does not simply "allow the jury to infer intent to kill" from the intent to rape. (*Id.* at 52), For the jury is not instructed that it *may* find proof of a particular mental state such as premeditation, deliberation, or malice, from the fact that the killing occurred in the course of one of these felonies. Rather, the jury is told, as it was here, that if it finds that the killing occurred in the course of such a felony, even if the killing is entirely accidental, this *is* murder in the first degree. In other words, proof of the felony is not an "intent divining mechanism," as the lower court put it; rather, it is a mechanism which eliminates altogether the government's need to prove any criminal intent with respect to the killing.

Thus it is simply not true, as respondent contends several times in its brief, that to be guilty of felony murder the defendant necessarily "performs two separate acts" (Respondent's Brief at 27), which are "each committed independently of the other." (*Id.* at 52). If, for example, in the course of a purse snatch, the victim falls down and strikes her head, dying as a result, this is first degree felony murder. So also is an accidental killing by the defendant, or even his accomplice.[2] *See e.g. Mum-*

States, 432 U.S. 137 (1977). But, moreover, as petitioner will show, to the extent that common sense is relevant to the resolution of such issues, it is the government's position, not his own, that is in fact contrary to common sense.

[2] Liability under the felony murder rule has even been held to extend to cases where it is an accomplice, rather than the intended

[footnote continued]

forde v. United States, 130 F.2d 411 (D.C. Cir.), *cert. denied*, 317 U.S. 656 (1942). Where the killing in fact results from a separate act, the government may well be able to charge and prove either premeditated murder or, as it did here, second degree murder (with malice), as well as the underlying felony. Where it does so, consecutive sentences would, as petitioner acknowledged in his brief, unquestionably be constitutional. But where the killing is predicated and proved as a first degree murder only upon proof of the underlying felony, then the felony is in fact a lesser included offense, for in proving such a murder all the elements of the felony must necessarily be proved. And, in a perfectly straightforward, common sense, way, consecutive sentences for the felony and for the first degree murder wholly dependent on it, constitute double punishment for that underlying felony.

Petitioner submits, then, that it is the government's position which is "contrary to common sense". Moreover, the government's casuistic argument that, "under D.C. Code Ann. 22-2401, . . . neither rape nor any of the other enumerated felonies is a *necessarily* included offense of felony murder, since proof of the commission of *any* of those enumerated felonies is sufficient to support a felony conviction", (Respondent's Brief at 26), entails absurd results. (Petitioner's Brief at 17-18). For example, on this theory an assault with intent to kill—the aiming of the gun just before pulling the trigger—would not be a lesser included offense of the premeditated murder which ensues from the deadly

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victim of the underlying felony, who dies, and where the death occurs at the hands of that victim or the police, rather than of the defendant or a cohort. *See generally*, G. Fletcher, Rethinking Criminal Law §4.4 (1978). The courts of the District of Columbia have not yet had the occasion to define the outer limits of felony murder liability here.

shot. This would be so because, as petitioner argued in his brief, *it is possible* to commit a murder under 22 D.C. Code 2401 without an assault, as by poisoning, and, of course, it is possible to commit an assault with intent to kill without killing. (Petitioner's Brief at 18.) Now, it is true, as respondent points out, (Respondent's Brief at n.11), that administering poison is proscribed in D.C. Code 22-501 along with actual assaultive crimes. But this is mere happenstance, and the poisoning provision is not described therein as a form of assault. At all events, petitioner's point remains valid, for it is surely possible to be guilty of first degree murder without an intent to kill, e.g., by an accidental killing in the course of an enumerated felony, and, again, it is of course possible to commit an assault with intent to kill without actually killing. Thus on the government's theory, assault with intent to kill is *never* a lesser included offense of first degree murder whatever the nature of the murder actually charged.[3] This is ridiculous. The rape here was a lesser included offense of the

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[3]The crowning glory of the government's position is this: a statute that, for example, proscribes possession of a series of named narcotic substances would, on the government's theory, be said to have no required elements at all. This is because there is no single element that need be proved to establish a violation of it. Does this mean that it is a lesser included offense of all other offenses, real or imagined? For by having no necessary elements, it per force has no necessary elements apart from those required for proof of the other offense whatever that offense's elements might be.

Similarly, 21 U.S.C. §846, at issue in *Jeffers v. United States*, 432 U.S. 137 (1977), would state an offense with no necessary elements, for it proscribes conspiring or attempting to do *any one of several* different substantive offenses. Thus it too would be a lesser included offense of any other. If this is so, it is a lesser included offense of §848 even if the "in concert" language of that section does not presuppose an agreement. See n.4, *infra*.

felony murder (rape) for the simple and compelling reason that the rape was charged and proved as the predicate for the murder.

The respondent's attempt to distinguish the prior decisions of this Court is as unpersuasive as its logic. *Brown v. Ohio*, 432 U.S. 161 (1977), the respondent contends, is different because, "here, in contrast to *Brown*, the Court of Appeals in construing the provisions of the District of Columbia Code, has concluded that rape is not a lesser included offense of first degree (felony) murder." (Respondent's Brief at 27). To begin with, this contention misconceives what this Court said in *Brown* about the role of the Ohio courts. While the state court had the final say on construing its statutes, it was not, as the government implies, for that court finally to decide whether, as so construed, one offense was a lesser included offense of the other and hence the same for double jeopardy purposes. As it happens, the Ohio court did conclude that joy riding was a lesser included offense of theft, but that conclusion was clearly subject to review. As this Court said in *Brown*:

> Applying the *Blockburger* test, we agree with the Ohio Court of Appeals that joy riding and auto theft as defined by that court, constitute "the same offense" within the meaning of the Double Jeopardy Clause." 432 U.S. at 168.

Thus, even if here the court below had concluded that rape was not a lesser included offense of felony murder (rape), its decision would be subject to review. But even more important, the government's attempt to distinguish *Brown* misdescribes what the lower court did in the present case; for it did not, as the government suggests, even purport to construe the statutes in such a way that rape was not in fact a lesser included offense

of felony murder, nor did it reach the erroneous (and reviewable) conclusion that as so construed rape was not a lesser included offense. Indeed, it explicitly recognized that "the underlying felony is an element of felony murder". App. at 17. Thus, like the state court in *Brown*, it effectively ruled that despite this relationship between the two relevant offenses, double jeopardy did not proscribe cumulative punishment, and in this respect its decision comes to this Court in precisely the same posture as that of the Ohio court in *Brown*.

With regard to the petitioner's argument from *Jeffers*, (Petitioner's Brief at 19-22), the respondent seems simply to have missed the point entirely. (Respondent's Brief at 27). Its discussion of that case succeeds only in demonstrating the self-evident point that if, as this Court assumed arguendo, "in concert" in 21 U.S.C. §848 did presuppose an agreement, then a conspiracy to commit the substantive violations proved under §848(b)(1) or (b)(2) would have been necessarily lesser included offenses of it. But a §846 count would not, on the government's theory of compound-predicate offenses, be a necessarily included offense; for a violation of §848 *can be* premised on substantive offenses which are not even proscribed under §846. Therefore, because it is possible to violate §848 without conspiring under §846, on the government's theory *Jeffers* should have been an easy case even if "in concert" did presuppose agreement. This would be so whatever offenses were charged under (b)(1) or (b)(2) as the §848 predicate. Yet eight Justices of this Court felt that, assuming "in concert" presupposed agreement, §846 would have been a lesser included offense of §848 because the same substantive offenses were *in fact* charged in the indictments. In other words, while

the §848 violation *could* have been premised on different substantive offenses than those described in §846, in *Jeffers* itself, the predicate offenses actually charged *would*, if proved also have constituted proof of a §846 violation. This is what eight members of this Court thought was critical.[4] It is equally critical here that the rape for which the petitioner was consecutively sentenced was in fact the felony charged as the predicate for the felony murder.

Furthermore, the government's impenetrable treatment of this Court's opinion in *Harris v. Oklahoma*, 433 U.S. 682 (1977), betrays the poverty of its contention that the underlying felony is not a lesser included offense of a felony murder predicated on it. In *Harris*, that contention was clearly repudiated by a unanimous Court which held: "[W]hen, as here, conviction of a greater crime, murder, cannot be had without

[4]The government's argument in n.13 of its brief is obscure. To begin with, the "series of violations" referred to in 21 U.S.C. 848 (b) (2) must itself include a substantive violation of (b) (1), and so such a violation must be "undertaken . . . in concert with five or more persons" to make out a §848 violation. But at all events, under (b) (2), any violations will suffice, so long as at least one of them is a (b) (1) violation. Thus, on the government's approach of looking at the statutes in the abstract, there is still no *necessity* that a §846 violation be proved in making out a §848 violation even if "in concert" does presuppose agreement. Only by looking at the indictments themselves, as eight members of this Court did in *Jeffers*, can we know that the §848 charge did in fact require proof of an §846 violation.

It is conceivable that in this footnote the government is embracing the proposition which petitioner offered as a *reductio ad absurdum* in n.3, *supra*, and arguing that §846 is a lesser included offense of all statutes that proscribe any sort of conspiracy. But even conspiring is not a necessary element of §846, so if this is the government's point, §846 *is* a lesser included offense of §848 even if "in concert" does not presuppose an agreement. See n.3, *supra*.

conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

Since this unambiguous holding utterly deflates the government's elaborate "compound-predicate" construct, it is not surprising that its response to *Harris* at pages 29-30 of its brief, can be seen slowly collapsing into its next argument: that even if, rape and felony murder (rape), are the "same offense", the Double Jeopardy Clause simply has no role to play where the issue is multiple punishment rather than successive trials.

Petitioner will not reiterate what he said in his brief with respect to this argument, (Petitioner's Brief at 11-13, 22-26) except to repeat that while this Court has recognized that the Double Jeopardy Clause may provide additional protection where successive trials are involved,[5] it has steadfastly adhered to the view that where two offenses are the same under *Blockburger*, the Double Jeopardy Clause forbids cumulative punishments. Those cases, such as *Gore v. United States*, 357 U.S. 386 (1958), *Albrecht v. United States*, 273 U.S. 1 (1927), and *Morgan v. Devine*, 237 U.S. 632 (1915), which the government cites in support of its contention that the issue is solely one of legislative intent, are grounded on the premise that the offenses involved were in fact different under a *Blockburger* analysis. Indeed, what this Court said in *Gore* itself, implies that cumulative punishment for the same offense is beyond the power of Congress:

> Certainly if punishment for each of separate offenses as those for which the petitioner here has

[5]*Brown v. Ohio*, 432 U.S. at n.6. *See also Ashe v. Swenson*, 397 U.S. 436 (1970).

> been sentenced, and not merely different descriptions of the same offense, is constitutionally beyond the power of Congress to impose, not only *Blockburger* but at least the following cases . . . would also have to be overruled.

357 U.S. at 392.

Similarly, the very language of *Jeffers* which respondent quotes at page 46 of its brief clearly reflects the view that the Constitution sets limits on the permissibility of cumulative punishment:

> If some possibility exists that . . . two statutory offenses are the same offense' for double jeopardy purposes, . . . it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties.

432 U.S. at 155.

As petitioner pointed out in his brief, on the government's theory that the only issue is one of legislative intent, there are, of course, simply no conceivable "constitutional difficulties" which this Court need seek to avoid. (Petitioner's Brief, pp. 22-26). *See also Simpson v. United States*, 435 U.S. 121 (1978) where this Court's recognition that there are lurking constitutional issues could not be clearer.[6]

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[6]In its opinion, the court below relied on Judge Bazelon's statement on why he would grant rehearing *en banc* in *United States v. Greene*, 489 F.2d 1145, (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974), for the notion that societal interest analysis is the exclusive test for determining the propriety of consecutive sentences. If Judge Bazelon ever held any such view, he has evidently seen the errors of his ways:

> [E]ven if Congress intends to punish a defendant twice for violating two statutory provisions, the double jeopardy clause may bar such multiple punishment at a single trial

[footnote continued]

Finally, as petitioner pointed out in his brief, the holding of this Court in *Brown, supra*, is explicitly premised on the proposition that the double jeopardy clause proscribes consecutive sentences at a single trial for a greater and lesser included offense:

> If two offenses are the same under this [*Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions.

432 U.S. at 166.

This is as it should be; for the Constitution straightforwardly proscribes being twice put in jeopardy "for the same offense." As this Court has said, it was "designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969), *quoting Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873). Acceptance of the government's suggestion that the phrase "same offense", like a chameleon, takes its meaning from its environment,[7] would inject unnecessary difficulties into this already complex area of the law. Moreover, that suggestion flies

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> if the two statutory provisions constitute the "same offense" under *Blockburger*.

United States v. Alston, ___ F.2d ___ (D.C. Cir. Oct. 22, 1979) (No. 77-2050), slip op. at 9, *quoting United States v. Dorsey*, 591 F.2d 922, 942 (D.C. Cir. 1978).

[7]It is ironic that the government so vigorously espouses a "functional approach" to the definition of "same offense" in this context, but apparently argues for a consistent and literal definition in resisting the suggestion for a "same transaction" test with respect to what charges the government must join for trial. *See Abbate v. United States*, 359 U.S. 187, 196 (1959) (opinion of Brennan, J.).

in the face of the language of the constitution and almost 100 years of precedent. It should be rejected once again.

II.

THE ISSUE OF LEGISLATIVE INTENT

In response to petitioner's argument that Congress intended to authorize a sentence of from 20 years to life for felony-murder, but not the longer sentence that would result from cumulating this sentence with that for the underlying felony, the government advances arguments based on the development of homicide at the common law, on the comparative sentences authorized for second degree murder and premeditated murder, and on the enactment of 23 D.C. Code §112. But, at the least, the government here faces a very strong presumption that Congress intended no consecutive punishment for offenses related as felony-murder is to the predicate felony (Petitioner's Brief at 32 n.18); and its arguments fail to overcome it.

In support of the Court of Appeals' treatment of the felony in a felony-murder prosecution as a mere "intent divining mechanism," the government traces the common law development of homicide, first through its division into murder and manslaughter, then through its further division into first and second degree murder, and, finally, through the division of first degree into the premeditated and felony murder varieties. (Respondent's Brief at 62-67). In petitioner's view, the common law antecedents of the District of Columbia murder provisions are in fact somewhat murkier than the government's discussion would suggest, *see Fisher v. United States*, 328 U.S. 463, 482 n.6 (1946) (Frankfurter, J., dissenting); but, at all events, this history is

of little use in resolving the issue at hand. For whatever legal fictions might have sustained the felony-murder rule in the past, the underlying felony now renders the actor's intent, with respect to the homicide, altogether irrelevant. It permits conviction for first degree murder when an altogether unintended and unforeseeable death results during the commission of one of the enumerated felonies. Thus, as the court below acknowledged, the felony is an element of the felony-murder. And, assuming cumulative punishment is constitutional, the question for decision is whether the 87th Congress, when it enacted the present sentencing provision, 22 D.C. Code §2404, intended that a person convicted of felony-murder be subject not only to the mandatory punishment of from 20 years to life for the homicide,[8] but to an additional penalty for the underlying felony as well.

In his initial brief, petitioner cited the legislative history of the sentencing enactment to show that Congress intended that the person convicted of first degree murder and sentenced to prison would become eligible for parole after 20 years. A proposal to permit a longer period of mandatory confinement was defeated on the grounds that after the passage of twenty years, even a heinous criminal might be rehabilitated or his crime might be viewed in a more dispassionate light. To permit consecutive sentencing for the necessarily included felony would altogether undermine this purpose.

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[8] As the government acknowledges, there is no evidence that before 1962 and the enactment of the current 22 D.C. Code §2404, Congress intended such consecutive punishment; for before that time a person convicted of felony-murder faced a mandatory death penalty. This, not logic, best accounts for the fact that second degree murder has been treated as a lesser included offense of felony-murder.

(Petitioner's Brief at 34-38). The government's only direct answer to this argument is the assertion that, for reasons it does not explain, a prosecutor might choose not to charge the underlying felony as a separate count. (Respondent's Brief at 73 n.9). It is just as true, and just as irrelevant, to say that the prosecutor might choose not to indict for felony-murder at all, or choose to seek an indictment only for a lesser offense. The point is, that Congress manifested a clear intent to set an absolute limit on the sentence to be served before parole consideration, following conviction for first degree murder, not, as the government seems to suggest, an intent to leave the setting of that limit to the prosecutor.

The government asserts that petitioner's theory would permit the person convicted of second degree murder, as well as the person convicted of premeditated first degree murder, to be punished more harshly than the person convicted of first degree felony-murder, contrary to the intent of Congress. For the bar against consecutive punishment which petitioner asserts exists, applies only to felony-murder; consecutive punishment for a felony arising out of the same transaction as the killing would be possible, the government says, if that killing is prosecuted on some other theory. In this sense, persons convicted of homicide after proof of actual premeditation or malice could receive a harsher, cumulative penalty. (Respondent's Brief at 72-74).

But the government has chosen the wrong units for comparison. A premeditated murder or murder committed with malice is simply not predicated upon any necessarily included lesser felony, as is felony-murder. Petitioner only asserts that a single felony may not do "double duty"—first, as the basis for elevating to first

degree murder what would otherwise be some lesser form of criminal homicide (or, indeed, no offense at all), and second, as the basis for a separate, consecutive sentence. Nothing in petitioner's argument would prohibit consecutive sentences for felony-murder and for a felony other than the one necessarily included in the homicide. And this is the relevant point of comparison. Petitioner's argument would not preclude consecutive sentencing for any form of murder and for any other felony, except when the felony is necessarily included within the homicide.[9]

Indeed, the government unwittingly concedes in its brief both the major and minor premise to petitioner's central statutory argument, which is that Congress

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[9] After an extended discussion of the societal interests at stake, the government concedes that "there is an inevitable overlap in the interests served by the felony murder provision and the various predicate felony statutes . . ." (Respondent's Brief at 77). This truth is most evident from a consideration of a paradigmatic felony-murder case, the prosecution of a lookout in a simple street robbery, which results in the vicitim's death, not because the robbery was peculiarly violent, but because the victim, unbeknownst to the robbers, was a heart pateint who dies from the shock of the robbery. There is nothing to distinguish the *conduct* of this lookout for the conduct of numerous other persons guilty only of robbery; this lookout may be found guilty of first degree murder only because of a fortuitous *consequence* of that conduct. Thus it is difficult to see why punishment for the murder should not be viewed as embracing also punishment for the robbery. If there is more to the killing than this, then the person may be prosecuted on some other theory of homicide. But to obtain a conviction for felony murder, the prosecutor need only show facts like these. Nor is the analysis any different if it was the victim's companion who died from the heart attack; or if the robbery was only attempted and never consummated. Finally, the fact that Congress provided the same sentence, of from 20 years to life, for felony murder—no matter what the underlying felony—reflects only Congress' intent, amply evidenced in the legislative record, to set a ceiling on the potential, minimum sentence.

could not have intended consecutive sentences, since the result would be to permit harsher punishment for the person convicted of felony-murder than the person convicted of premeditated murder. As the government concedes, (Respondent's Brief at 71), "the legislative record manifests Congress' belief that a person convicted of felony murder would be subject to the same penalty as one convicted of premeditated murder." Yet, earlier on, the government offered this description of the Court of Appeals' holding (*Id.* at 16):

> In effect, the court construed the punishment provisions of the pertinent sections of the District of Columbia Code as though they read as follows:
>
> > For the commission of a premeditated homicide, the defendant shall be sentenced to a term of from 20 years' to life imprisonment. For the commission of any homicide, whether or not premeditated, in the course of a rape, the defendant shall be sentenced to a minimum term of from 20 to 35 years' imprisonment and a maximum term of life imprisonment.

The conclusion that ineluctably follows, although the government does not acknowledge it, is, of course, that Congress could not have intended the result reached by the Court of Appeals.[10]

The government's effort to find support for consecutive sentencing for greater and lesser included offenses from 23 D.C. Code §112 is equally unavailing. (Respondent's Brief at 79-86). As its brief shows, (*Id.* at 80-83), Congress enacted this provision in response to a

[10]The defendant convicted of felony murder would, on the government's view, *always* be subject to harsher punishment because in addition to his sentence for first degree murder he could also be consecutively sentenced on the underlying felony as well.

series of decision from the United States Court of Appeals for the District of Columbia Circuit that required concurrent sentencing in two classes of cases: where the offenses arose out of separate transactions but the sentencing judge failed to specify consecutive sentencing; and, under some limited circumstances, where the offenses arose out of the same transaction and were separate under *Blockburger*. Yet the government asserts that Congress, in addition, intended this enactment to permit consecutive sentencing even for greater and lesser included offenses arising out of the same transaction—a mode of sentencing which was never before thought possible.

The government cites not a shred of evidence from the legislative record in support of this remarkable submission, but relies exclusively on a "plain meaning" argument. In relevant part, 23 D.C. Code §112 permits consecutive sentencing on a conviction

> whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

Clause (2), according to the government, should be read as though it authorized consecutive sentencing whether or not the offense "requires proof of a fact which the other does not, given that they both arise out of the same transaction." But other than to suggest that the statute might have been drafted so as to avoid any possibility of the perverse reading of it that the government makes—a reading which surely could not have been foreseen—the government offers no reason to accept its tortured construction. (Respondent's Brief at 84).

And tortured reading it is; for the only natural meaning of this passage, as well as the only meaning consistent with the conceded purpose of the legislation, is that consecutive sentences may be imposed for offenses arising out of the same transaction, but only when each requires proof of a fact which the other does not. The words "whether or not", as applied to clause (2), simply apply to both conditions mentioned in that clause—same transaction *and* proof of an additional fact—as a unit, and not to each individually, as might have been the case if the disjunctive rather than conjunctive had been used. The statute simply permits consecutive sentencing when the offenses arise out of different transactions whether or not the charges involve commission of the "same" offense;[11] and it permits such sentencing for offenses arising out of the same transaction when the offenses are not the "same".

Moreover, section 23-112 have never been interpreted as the government now urges. One influential analysis of the court reform legislation, of which this section was a part, explained its intended meaning:

> Under new 23 D.C. Code §112, a sentence imposed for an offense is to run consecutively to any other sentence imposed on the same person for another offense (1) if the other offense arises out of another transaction or (2) if the other offense arises out of the same transaction but requires proof of a fact which the other does not. *Sentences do not run consecutively* if the court imposing sentence provides to the contrary or *if the offenses arise out of the same transaction and require proof of the same facts. . . .*

[11] In this class of cases, it was not, of course, the *power* of the trial court to impose consecutive sentences that was at issue.

> This section eliminates the alleged ambiguities which induced the Court of Appeals to resort to the rule of lenity by establishing the intent of Congress with respect to punishment for different offenses. That intent is to authorize imposition of consecutive sentences for offenses arising out of the same transaction which require proof of a fact which the other does not, the test specifically approved by the Supreme Court in *Blockburger v. United States.*

Rauth & Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 AM. U.L. REV. 252, 331, 334 (1970-71) (emphasis supplied).[12] Thus, although petitioner did not bring this provision to the Court's attention in his initial brief, it in fact provides additional evidence that Congress intended no consecutive punishment when, as the court below acknowledged with respect to felony murder and the underlying felony, one offense "is an element of" the other. App. at 17.[13]

[12] Mr. Rauh and Mr. Silbert are, respectively, the current United States Attorney for the District of Columbia and his immediate predecessor. At the time the article was published, Mr. Rauh was a Department of Justice attorney, and Mr. Silbert was Executive Assistant U.S. Attorney. Although they disclaimed any intention of speaking for the Department of Justice, id., at 252, their article has often been cited as an authoritative interpretation of the Court Reform Act. *See, e.g., Rushing v. United States*, 381 A.2d 252, 257 (D.C. Ct. App. 1977); *Borum v. United States*, 318 A.2d 590, 593 n.8 (D.C. Ct. App. 1974); *United States v. Miller*, 298 A.2d 34, 36 n.6 (D.C. Ct. App. 1972); *Brown v. United States*, 289 A.2d 891, 892-93 (D.C. Ct. App. 1972); *Jenkins v. United States*, 284 A.2d 460, 464 (D.C. Ct. App. 1971).

[13] The government acknowledges that under its reading of the statute, consecutive sentences could be imposed for such offenses as robbery and armed robbery, which have always been considered

[footnote continued]

Nor does the government's brief advance any convincing reason why this Court should decline to take cognizance of the fact that Congress intended no double punishment here. Unlike *Pernell v. Southall Realty*, 416 U.S. 363 (1974), this is not a case where this Court should abstain from exercising its conceded authority[14] to construe a

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the "same" offense, and for which such sentences have never before been thought possible. (Respondent's Brief at 84-85). It nonetheless suggests that the statute should not be given "literal" effect in such a case (though never giving a principled reason why not, if its reading is in fact correct), and then attempts to downplay the significance of this revelation, by asserting such a problem would arise but seldom, "since offenses standing in such a relationship to one another are not ordinarily charged in separate counts and thus produce only a single conviction." (Respondent's Brief at 84-85). In fact, however, this problem does often arise; for the U.S. Attorney for the District of Columbia frequently charges such offenses as separate counts of an indictment, and lesser offenses are often submitted to the jury. The appellate courts in the District, accordingly, have often vacated convictions for lesser offenses. E.G., *United States v. Johnson*, 475 F.2d 1297 (D.C. Cir. 1973); *Skinner v. United States*, 310 A.2d 231 (D.C. Ct. App. 1973); *Woody v. United States*, 369 A.2d 592 (D.C. Ct. App. 1977); *Bell v. United States*, 332 A.2d 351 (D.C. Ct. App. 1975); *Taylor v. United States*, 324 A.2d 683 (D.C. Ct. App. 1974); *Quick v. United States*, 316 A.2d 875 (D.C. Ct. App. 1974).

[14]That authority is, of course, unquestionable. For example, *Swain v. Pressley*, 430 U.S. 372 (1977), rested on a construction of 23 D.C. Code §110(g), a provision of purely local application. The Court there held that that section precluded the federal courts in the District from granting habeas corpus relief to prisoners who seek to challenge their convictions from the Superior Court. To be sure, the ultimate issue in the case was the scope of federal court authority to issue a writ of habeas corpus. The case arose in the federal courts, but the issue was not altogether dissimilar from the issue here. The issue here, as in *Pressley*, is one of court authority, namely the authority to impose consecutive sentences. And while this case in fact arose in the Superior Court, it could as well have arisen in the local federal courts, for, as pointed out in

[footnote continued]

congressional enactment of local application, for here, important federal interests are implicated which were altogether absent in *Pernell*.

Foremost of these is the fact that the statute's meaning is inextricably bound with appellant's assertion that he has been doubly punished, in violation of the Fifth Amendment. Even under the government's restrictive reading of the Double Jeopardy Clause, that clause was violated if petitioner has been sentenced consecutively, contrary to Congress' intent. (Respondent's Brief at 35 & n. 19). Yet the government urges this Court to decline to correct any such error in determining that intent. It argues that such an unconstitutional sentence should be allowed to stand, even though this Court's competence to discern the intent of the national legislature is surely equal to that of the Court of Appeals.[15] Principles of comity should not, in

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text, *infra*, those courts still enjoy some concurrent authority to enforce local criminal laws. Furthermore, as in *Pressley*, the statutory issue here requires resolution because of the unique distribution of judicial power in the District: the concurrent federal-local criminal jurisdiction has yeilded a conflict which may remain unresolved if this Court abstains. *See* text, *infra*, at 20. While the government is of course correct in asserting that the District is like a state in some important respects, particularly after court reorganization in 1970, see Brief at 57, it is also true that "the District of Columbia is constitutionally distinct from the States." *Palmore v. United States*, 411 U.S. 389, 395 (1973). And all can agree with Mr. Justice White's observation that:

> Though today the District of Columbia has a measure of home rule, the United States retains important interests in the District of Columbia, ranging from extensive federal property to the welfare of hundreds of thousands of federal employees.

Key v. Doyle, 434 U.S. 59, 76 (1977) (White, J., dissenting).

[15]As judged by the relevant tools for discerning Congressional intent as set forth in the Government's brief at 60-61, the inquiry of the court below was superficial indeed. It considered only the

[footnote continued]

petitioner's view, restrain this Court from correcting constitutional error in these circumstances. Furthermore, unlike the statute at issue in *Pernell*, the impact of which was limited to the Superior Court, the statute at issue here is a criminal enactment, which remains of federal as well as local concern. For even after court reorganization, the U.S. District Court for the District of Columbia retains jurisdiction over local offenses, when properly joined with federal offenses.[16] *See* 11 D.C. Code § § 502(3). And, in exercise of this jurisdiction, the federal courts must often determine whether or not Congress intended punishment under D.C. Code provisions to be consecutive to other punishment. *E.G., United States v. Alston,* ___ F.2d ___ (D.C. Cir. Oct. 22, 1979) (No. 77-2050) (holding that Congress did not intend consecutive punishment under the District of Columbia false pretenses statute and the federal false statements statute but did intend consecutive punishment for the local offense and federal mail or wire fraud violations).[17]

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interests it thought the statutes served, and based its holding on a misguided "intent divining" theory of felony murder. Most notably absent was any examination of the pertinent legislative history and the circumstances of enactment. And even its "interests" analysis was internally inconsistent. (*See* Petitioner's Brief at 28 n. 12).

[16]Congress has, since court reorganization, further evidenced its view of the continuing federal interest in the enforcement of local penal statutes, when, in granting expanded legislative authority to the District of Columbia Council, it specifically retained exclusive jurisdiction for a time over the criminal law. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), §602(a)(9), *as amended by* Act of Sept. 7, 1976, Pub. L. No. 94-402, 90 Stat. 1220, *codified at* 1 D.C. Code §147(a)(9).

[17]As the Circuit Court has stated in the course of resolving an issue similar to that presented in *Alston:*

> [W]e note that the instant case involves the District of Columbia where Congress, in enacting both the federal and

[footnote continued]

The federal interest in the construction of section 2401 is, moreover, even greater than in local penal statutes in general because, as the U.S. Court of Appeals was held, the prosecution here may look to the United States Code, as well as the D.C. Code, for the underlying felony on which to base a felony murder charge. *United States v. Greene, 489 F.2d 1145,* 1150-51 (D.C. Cir. 1973). Thus prosecutions under section 2401 are not all purely local, even to the extent of other D.C. Code violations charged in federal court. Some such prosecutions are "hybrid," involving elements of both local and federal law. Furthermore, this concurrent local and federal jurisdiction over felony murder prosecutions has given rise to a palpable conflict which will remain unresolved if the government's invitation to abstain is accepted. For the United States Circuit Court, in *Greene, supra,* has held that felony murder and the underlying felony do in fact merge. *Id.* at 1158. Because the court's holding in *Greene* does not appear to rest on the Double Jeopardy Clause, it therefore reflects a disagreement with the District of Columbia Court of Appeals over the construction of the statute. If, then, this Court were to reject petitioner's constitutional argument without considering Congress' intent, this conflict between the courts – which was a principal reason petitioner advanced in support of his request for certiorari, as well as a reason that the government did not oppose the writ – would remain unresolved, a manifestly undesirable result.[18]

> local codes, acts as a single sovereign. This court repeatedly has been required to determine whether Congress intended to subject a defendant to multiple punishments for a single act or transaction under similar provision in the federal and District of Columbia criminal codes.

United States v. Dorsey, 591 F.2d 922, 938 (D.C. Cir. 1978).

[18]After court reorganization, review by this Court is virtually the only mechanism for resolving such conflicts between the courts

For these reasons, this Court should exercise its unquestioned authority to construe 22 D.C. Code § § 2401. The propriety of doing so is all the clearer, since if the Court accepts petitioner's argument with respect to Congress' intent, the constitutional issues in this case may be avoided See *Simpson v. United States,* 435 U.S. 6, 11-12 (1978); *Jeffers v. United States,* 432 U.S. 137, 155 (1977).

The government also urges this Court to ignore the question of whether or not Congress intended double punishment under the circumstances of this case because it was not raised in the petition for certiorari. But, to begin with, it was raised. The question presented in the petition was whether the merger doctrine prohibited the consecutive sentence that petitioner received.[19] While petitioner noted that the merger doctrine is, indeed, "an integral part of the Double Jeopardy Clause of the Fifth Amendment," the question of merger is in the first instance a question of statutory construction and legislative intent. The question presented thus fairly encompassed the issues discussed in the second section of petitioner's brief, *viz.*, whether, given the fact that the rape charge was an element of the felony murder charge, Congress intended consecutive punishment

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of the District of Columbia. Before reorganization, of course, decisions of the District of Columbia Court of Appeals were reviewed in the U.S. Court of Appeals. Now even habeas corpus review in the federal courts is ordinarily unavailable to persons convicted in the Superior Court. *Swain v. Pressley,* 430 U.S. 372 (1977).

[19]So far as it is relevant to petitoner Whalen's case, the question presented in the petition was:

> Whether the doctrine of merger of offenses, an integral part of the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution, precludes the [] trial court [] from imposing consecutive sentence [] on . . . petitioner Whalen for felony murder and the underlying offense of rape. . . .

Petition for Certiorari, at 3-4.

after conviction for both offenses. To be sure, the government's brief in response to the certiorari petition framed the issue more narrowly, as whether the imposition of consecutive sentences here "violates the Double Jeopardy Clause," (Brief in Response to Certiorari Petition, at 2); but surely petitioner is not bound by the government's statement of the question.

Moreover, even if the petition were deemed to present only a constitutional issue, and not an independent issue of statutory construction, the statutory issue would still, on the government's own view, clearly be subsumed within the constitutional issue. *Cf.* Sup. Ct. R. (23 (1) (c) ("every subsidiary question fairly comprised therein" deemed included in question presented for review). For under the government's theory of the Double Jeopardy Clause, punishment greater than that which Congress intended is constitutionally impermissible. As the Government argued in its brief, for petitioner to prevail on his constitutional claim, he must show:

> that the trial court, in imposing separate sentences for rape and felony murder in a single sentencing proceeding following a single trial, has exceeded its legislative authorization by imposing multiple punishments where the legislature did not authorize them. (Respondent's Brief at 42).

Petitioner could hardly undertake this burden without attempting to show, as he did in section two of his brief, that Congress did not intend the consecutive punishment that was imposed.

Finally, under the government's crabbed mode of construing petitions for certiorari, *Jeffers v. United States, supra,* should never have been decided on the grounds that it was. Presented in the certiorari petition in that case was this question:

> Was the double jeopardy clause of the Fifth Amendment violated when the Court of Appeals, relying upon this Court's decision in *Ianelli v. United States*, (420 U.S. 770), held that here may be a continuing criminal enterprise after a conviction on a lesser of conspiracy.

Petition for a Writ of Certiorari, at 2. This question unambiguously presented a constitutional issue and that alone. Yet when the Court decided that *Jeffers* should not have been fined separately on his separate convictions, 432 U.S. at 154-58 (plurality opinion), its decision ultimately rested on the Court's construction of the relevant statutes.

Respectfully submitted,

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